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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

JOHN CHARLES BURDEN,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

QUESTIONS PRESENTED

1. Whether Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973), and Morrissey v. Brewer, 408 U.S. 471, 489 (1972), grant the right "to present . . . documentary evidence" not only to the accused but also to the State; and

(a) whether a State, having used a written declaration, may sustain probation revocation on grounds that the "declaration was received in evidence without cross-examination," 105 Cal.App. 3d at 992, or

(b) whether use of such a declaration violates "the right to confront and cross-examine adverse witnesses," Morrissey v. Brewer, supra, 408 U.S. at 489, guaranteed by due process.

2. Whether to avoid denial of the right to confront witnesses it is incumbent upon an accused to bring a hearsay declarant into court to support the prosecution's case.

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Petitioner John Charles Burden respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, entered on March 7, 1980.

OPINION BELOW

The opinion of the state court of appeal, reported at 105 Cal. App. 3d 917, ___ Cal. Rptr. ___, ___ P.2d ___ (1980), appears in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeal of the State of California was entered on March 7, 1980. A timely petition for hearing was denied by the Supreme Court of California on May 8, 1980, and this petition for writ of certiorari is filed within 90 days of that date pursuant to Rule 22(1) of the Rules of this Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Convicted of grand theft, petitioner was placed on probation. At a subsequent hearing the prosecution relied heavily on hearsay evidence. Probation was revoked.

The court of appeal affirmed, holding petitioner had failed to subpoena adverse witnesses and that petitioner had failed to cross-examine a declaration. Thus presented are the following questions:

1. Whether Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973), and Morrissey v. Brewer, 408 U.S. 471, 489 (1972), grant the right "to present . . . documentary evidence" not only to the accused but also to the State; and

(a) whether a State, having used a written declaration, may sustain probation revocation on grounds that the "declaration was received in evidence without cross-examination," 105 Cal. App. 3d at 992, or

(b) whether use of such a declaration violates "the right to confront and cross-examine adverse witnesses," Morrisey v. Brewer, supra, 408 U.S. at 489, guaranteed by due process.

2. Whether to avoid denial of the right to confront witnesses it is incumbent upon an accused to bring a hearsay declarant into court to support the prosecution's case.

CONSTITUTIONAL PROVISION INVOLVED

Section one of the Fourteenth Amendment provides in pertinent part:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

U.S. Const. amend. XIV(1) (West 1968).

STATEMENT OF THE CASE

1. Proceedings Below

On June 21, 1974, petitioner John Charles Burden was charged with conspiracy and grand theft. The indictment alleged in essence that petitioner had conspired to obtain bank loans using a false financial statement.

Convicted by jury, petitioner was sentenced five years probation, including one year of actual custody. A condition of probation was that petitioner "not involve himself in the organization and promotion of corporations, and not involve himself in the obtaining of loans from financial institutions." (C.T. 21.)

Having served his jail sentence, petitioner was a successful probationer when on September 28, 1978, he received a notice to show cause alleging a violation of the quoted condition. Following a February 1979 hearing, the trial court revoked probation. Probation was reinstated and extended for two years on condition petitioner serve six more jail months.

On March 7, 1980, the court of appeal affirmed, finding petitioner "received every benefit the law permits in a revocation of probation proceeding." 105 Cal. App. 3d at 922. On May 8, 1980, the state supreme Court denied a petition for hearing but ordered the appellate opinion published in the official reports.

2. Statement Of Facts

At the revocation hearing, the prosecution called one witness, John D. Armstrong, an investigator for the San Diego district attorney's office (R.T. 6). Over objection, Armstrong testified that on August 14, 1978, he had a telephone conversation with an unknown voice. According to Armstrong, the voice claimed to be that of a Mobile, Alabama, attorney named Alidor (R.T. 13). As retold by Armstrong, the voice alleged that it represented a trio of unidentified Mobile businessmen who were attempting to build an apartment complex (R.T. 14).

Armstrong went on to relate that the voice indicated that its unidentified clients had entered into "some type of business relationship" with petitioner in which petitioner would get interim financing of $400,000. Armstrong said the voice said someone said petitioner would receive a one-fourth interest in the apartment complex if he obtained financing (R.T. 15).

According to Armstrong, the voice went on to read a financial statement somehow attributed to petitioner (R.T. 15). From his notes Armstrong told the trial court the contents of the purported document (R.T. 16).

Asked to identify the clients in Mobile, the voice refused (R.T. 18).

Armstrong stated that he asked the voice whether petitioner had caused the alleged financial statement to be presented to a bank. As recalled by Armstrong, the voice suggested that a Clarence Davis of the First Alabama Bank might be handling the loan application. The voice led Armstrong to believe that petitioner's purported statement had been used and considered by Clarence Davis at the bank (R.T. 19).

The voice told Armstrong that the financial statement had been presented to Clarence Davis at the bank in Mobile but did not know by whom it had been presented, nor did the voice state the source of its information (R.T. 20).

On cross-examination, Armstrong admitted that the voice alleged to be that of Alidor never told Armstrong it had ever met petitioner (R.T. 21). Armstrong reiterated that the voice refused to identify its clients (R.T. 23). Moreover, said Armstrong, after the inditial conversation, the voice called back and stated that it had asked permission of the clients to reveal their identities to the district attorney but that the clients wished to remain anonymous (R.T. 25).

A declaration of a John A. Davis was considered despite petitioner's complaint that Davis was unavailable for cross-examination (R.T. 194).

Thus, the revocation hearing consisted of the spectacle of a district attorney investigator testifying to the telephonic statements of a voice from Mobile, Alabama. This voice related

information obtained from its alleged clients who were unidentified and remain unidentified to this day. The voice essentially stated that it received information from other persons that petitioner was somehow involved in an attempt to obtain financing for a real estate venture. The voice was not even able to state whether the financial statement was mailed by petitioner or was used by one of his clients.

It is difficult to conceive of evidence more unreliable, speculative and inherently incredible upon which to send a man to jail.

With specific reference to Morrissey v. Brewer, supra, petitioner objected to the denial of his right of confrontation (R.T. 10, lines 8-20).

REASONS FOR ALLOWING THE WRIT

BY SUSTAINING ADMISSION OF GROSSLY UNRELIABLE HEARSAY AT A PROBATION REVOCATION HEARING, THE STATE COURT OF APPEAL HAS SERIOUSLY UNDERMINED THE DICTATES OF MORRISSEY V. BREWER, 408 U.S. 471 (1972).

The narrow issue of this petition is whether hearsay evidence of the sort introduced at petitioner's revocation proceeding is admissible.

Chief Justice Burger, in defining the minimal requirements of due process applicable at revocation proceedings, stated:

> "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); . . . ."

Morrissey v. Brewer, supra, 408 U.S. at 489 (emphasis supplied); see Gagnon v. Scarpelli, supra, 411 U.S. at 786.

The right to confront and cross-examine adverse witnesses was not a right left to speculation or inference. Chief Justice Burger specifically dealt with the right by defining it as one of "the minimum requirements of due process." Morrissey v. Brewer, supra, 408 U.S. at 489 (emphasis supplied). Deviation from classic confrontation and cross-examination is permissible only upon a finding of "good cause." The record in this case is clear that there was no confrontation and no finding of good cause.

There can be no doubt that the admission of the testimony of investigator Armstrong as to the conversation with a voice said to be from Mobile, Alabama, denied petitioner what

Chief Justice Burger described as "the minimum requirements of due process."

The view of the state court of appeal is unprecedented. In part, the court found that petitioner "did not depose the hearsay declarant Alidor or request his personal appearance." 105 Cal. App. 3d at 921. It is novel, to say the least, to rule that a party may not enjoy the right of confrontation unless the party himself brings a hearsay declarant into court to support the prosecution's case.

It further appears that petitioner was denied his right to confront John Davis. Davis had been present at the hearing but left before he could be cross-examined (R.T. 194). But, to the state court of appeal, there was no violation of this Court's Morrissey dictates. Indeed, held the state court, the Davis "declaration was received in evidence without cross-examination." 105 Cal. App. 3d at 922. Nowhere in Morrissey, however, is there support for the theory that a declaration can be cross-examined.

So that the state court's cavalier disregard of Morrissey may not gain precedential viability, this Court properly should issue its writ of certiorari.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California.

Respectfully submitted,

ROBERT SHEAHEN

Attorney for Petitioner

APPENDIX A

People v. Burden
105 Cal. App. 3d 917; ___ Cal. Rptr. ___

[Crim. No. 11312, Fourth Dist., Div. One, Mar. 7, 1980.]

THE PEOPLE, Plaintiff and Respondent v. JOHN CHARLES BURDEN, Defendant and Appellant.

OPINION

WIENER, J. - Defendant appeals from an order revoking probation granted after the imposition of sentence upon his conviction in a jury trial of grand theft (Pen. Code, § 487, subd. 1) and conspiracy to commit grand theft (Pen. Code, §§ 182, subd. 1, 487, subd. 1). He attacks the condition of his probation which provides that he "not involve himself in the obtaining of loans from financial institutions" as invalid and contends the court prejudicially erred in admitting hearsay testimony during his revocation hearing. As we will explain neither argument has merit. We affirm the order.

Procedural Background

Defendant was named and charged in 5 counts in a 31-count indictment returned on June 21, 1974. On June 27, 1975 he was convicted by a jury of three counts of grand theft and one count of

conspiracy to commit grant theft. On August 25, 1975, Judge Franklin B. Orfield, the judge who had presided over the trial, granted defendant probation for a period of five years on the conditions, inter alia, he serve a total of two years in local custody and "not involve himself in in the organization and promotion of corporations, and not involve himself in the obtaining of loans from financial institutions." (Condition 2.) Defendant was released from custody on August 16, 1976.

On September 28, 1978 a notice to show cause was filed with copies mailed to defendant and his counsel alleging a violation of condition 2 and setting November 13, 1978, as the date for hearing on revocation of probation. The form of the notice to show cause included a statement of defendant's rights under People v. Vickers (1972) 8 Cal. 3d 451 [104 Cal. Rptr. 305, 503 P. 2d 1313]. From time to time thereafter by agreement between counsel the hearing was continued. The evidentiary hearing started on February 14, 1979, and continued through the 16th. The court revoked defendant's probation on March 5, 1979. On May 24, 1979, probation was reinstated and extended for two years conditioned upon defendant serving an additional six months in custody.

Probation Condition 2 Is Valid

This court affirmed defendant's conviction in People v. Burden, 4 Crim No. 8213. (1) In that appeal defendant neither raised nor challenged the validity of his probationary terms. Having failed to do so at that time he may not do so now.

(See People v. Vest (1974) 43 Cal. App. 3d 728, 731 [118 Cal. Rptr. 84].) Moreover, even during the course of the present revocation proceedings defendant did not question the terms of his probation. Nevertheless, regardless of defendant's waiver of his right to appeal on this issue, we address the merits of his argument.

Burden complains condition 2 prevents him from living in a modern society because he is prohibited from "buying a car, charging a meal, buying a home, and numerous legal and necessary activities." Undoubtedly defendant's commercial activities have been and now are restricted because of his probationary status.

(2) A condition of probation which "forbids conduct which is not itself criminal is valid if that conduct is reasaonbly related to the crime of which the defendant was convicted or to future criminality." (People v. Lent (1975) 15 Cal. 3d 481, 486 [124 Cal. Rptr. 905, 541 P. 2d 545].) Defendant's conviction involved grand theft in which he used false financial statements to obtain bank loans. It would hardly have been appropriate for the court to have allowed defendant, a promoter with unique sales ability, to remain on probation after his grand theft conviction and enter freely into the marketplace to resume merely where he had left off. Condition 2 read in conjunction with the condition prohibiting defendant from organizing and promoting corporations is valid.

The Admission of Hearsay Testimony at Defendant's Revocation Hearing Did Not Deny Him Due Process of Law

Defendant asserts the "narrow issue of this appeal is whether hearsay of the sort adduced at [his hearing] is admissible." His argument implies the sole evidence before the court which resulted in the revocation was hearsay testimony. Before we reach the legal question, it is helpful to summarize the record to place defendant's characterization of the issue in perspective.

The proceedings to revoke probation started in September 1978, approximately four and one-half months before the evidentiary hearing. During that period both defendant - lawyer trained, sophisticated and knowledgable - and his counsel prepared for the hearing. The documentary evidence presented at that hearing included affidavits/declarations signed by witnesses favorable to defendant some of which were drafted at least in part by defendant working alone or with his attorney. In addition to the documentary evidence - a total of 25 exhibits; exhibits A-U were introduced by defendant - the court heard from defendant both on direct and cross-examination and in response to the court's questioning.

Defendant does not, nor could he, challenge the order of revocation on the grounds of insufficiency of the evidence for there is substantial evidence to support the finding that defendant was involved in obtaining a $400,000 short term loan for a real estate project in which he had, at least prospectively, a financial interest. He has asked

us to focus on the error which permitted hearsay evidence from witnesses whom he contends, as a matter of due process, he was entitled to confront and cross-examine.

(3) The statute (Pen. Code, § 1203.2, subds. (a), (b)) and precedent expressly authorize the use of hearsay testimony in a revocation proceeding. (People v. Vickers, supra, 8 Cal. 3d 451, 457-458, quoting from Morrissey v. Brewer (1972) 408 U.S. 471, 489 [33 L.Ed.2d 484, 499, 92 S.Ct. 2593, 2604] ["'[T]he process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.'"]; see also In re Thomas (1972) 27 Cal.App.3d 31, 34-35 [103 Cal.Rptr. 567]; People v. Turner (1975) 44 Cal.App.3d 753, 756 [118 Cal.Rptr. 924]; People v. Buford (1974) 42 Cal.App.3d 975, 982-983 [117 Cal.Rptr. 333]; People v. Rafter (1974) 41 Cal.App.3d 557, 561 [116 Cal.Rptr. 281].) The rub arises where the use of the affidavits or other hearsay impinges on defendant's right to confront and cross-examine witnesses. Under such circumstances, as Vickers indicates, there should be a hearing to determine whether there is good cause to excuse confrontation. Where good cause exists no problem arises. Where good cause does not exist and the testimony is essential for revocation, due process requires defendant's probation not be revoked.

Here, defendant had an extended period of time to prepare for the hearing. Working with the assistance of his lawyer they did not depose

the hearsay declarant Alidor or request his personal appearance. During the course of the proceedings defendant did not request a continuance to obtain sworn testimony from Alidor nor request his personal appearance. Having failed to do so after what appears from the entire record to have been a deliberate tactical choice, defendant cannot complain now about Alidor's absence at the hearing.

We are reluctant, however, to base our decision on waiver for the spirit of due process requires more. Maloney's phone call undoubtedly triggered the investigation of defendant which led up to the issuance of the notice to show cause. Alidor's statements corroborating Maloney were also instrumental at the start of the investigative process. But at the hearing itself, hearsay from Alidor and Maloney played only a small part in the evidentiary picture. The key testimony was from the banker, Davis. He was personally present at the hearing. His declaration was received in evidence without cross-examination. That evidence along with Burden's testimony and the documentary evidence was ample to support the finding of defendant's violation of probation.

Defendant received every benefit the law permits in a revocation of probation proceeding. The determination by the court was well reasoned and thoughtful. Defendant was not denied due process of law.

Disposition

Judgment affirmed.

Staniforth, Acting P. J., and Henderson, J.,* concurred.